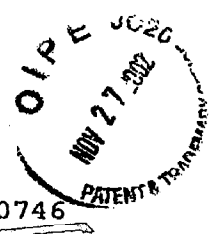


IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

-----X
:
Georgia Graham Jones, :
Petitioner, :
:
v. :
:
Alison Holtzschue, :
Registrant. :
:
-----X

Cancellation No. 92040746



MOTION TO SET ASIDE DEFAULT

Pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, registrant Alison Holtzschue ("Registrant") moves the Trademark Trial and Appeal Board (the "Board") to set aside the Notice of Default entered against Registrant and re-open this proceeding. Registrant's default is attributable to her never receiving the Petition to Cancel (the "Petition") and the notification thereof, apparently mailed by the Board on July 12, 2002, so that she was not on notice and could not file her Answer by the August 21, 2002, due date. See Fed. R. Civ. P. 55(a).^{*} The Board's July 12, 2002, notification

* The Federal Rules of Civil Procedure govern inter partes cases before the Board "wherever applicable and appropriate," except as specifically otherwise

(continued...)

correctly identifies Registrant's business address, but Registrant did not receive the Board's correspondence at that address. Registrant had no knowledge at all of this proceeding until she received the Board's Notice of Default, which was mailed on October 28, 2002.*

(... continued)

provided. 37 C.F.R. § 2.116(a). The Trademark Trial and Appeal Board Manual of Procedure ("TBMP") does not set its own standard for determining the circumstances under which to set aside a Notice of Default, but directs, instead, that the "good cause" standard of Fed. R. Civ. P. 55(c) be applied. TBMP (1995) §§ 317.01-317.02. See Paolo's Associates Ltd. v. Paolo Bodo, 21 U.S.P.Q.2d 1899, 1902 (Comm'r 1990).

In the Notice of Default, the Board allowed Registrant thirty days -- until November 27, 2002 -- to show cause why judgment by default should not be entered. However, Registrant did not learn the substance of the Petitioner's allegations until November 14, 2002, when the Board supplied a copy of its July 12, 2002, correspondence, including a copy of the Petition, in response to the request of Registrant's counsel. Registrant is now investigating the Petitioner's allegations in order to be prepared to file an Answer promptly upon the grant of this Motion.

Registrant has noted that the copy of the Petition that the Board sent to undersigned counsel by facsimile on November 14, 2002, contains no signature by either the Petitioner or her attorney or her authorized representative, as required by 37 C.F.R. § 2.119(e). Furthermore, the averments of the Petition are not "in numbered paragraphs" as Rule 10 of the Federal Rules of Civil Procedure requires. See TBMP (1995) § 312.03. Thus, the Petition cannot form a valid basis for a default in any event.

Rule 55(c) allows an entry of default to be set aside for "good cause shown." Fed. R. Civ. P. 55(c). Whether the requisite good cause exists to permit the late filing of an Answer by the registrant in a cancellation proceeding depends upon whether: (i) the registrant acted willfully in failing to file an Answer; (ii) the delay in the proceeding substantially prejudices the petitioner; and (iii) the registrant has a meritorious defense to the petitioner's claims. See Paolo's Associates, 21 U.S.P.Q.2d at 1902. See also Delorme Publishing Co. v. Eartha's, 60 U.S.P.Q.2d 1222, 1223-24 (T.T.A.B. 2000) (considering the same factors in the context of an opposition proceeding). Evaluation of these factors demonstrates that good cause exists to set aside the Notice of Default.

In this case, Registrant's failure to answer the Petition was clearly not the result of "an act that is willful, in bad faith, or in gross neglect." Paolo's Associates, 21 U.S.P.Q.2d at 1903 n.2. As noted above, Registrant was without any knowledge of the Petition or her duty to answer until receiving the Notice of Default. When Registrant received the Notice of Default, she went about retaining counsel to defend this action, and has acted with reasonable promptness in filing this Motion, which she

could not reasonably do before learning the grounds for the Petition on November 14.

There is also no indication that the Petitioner will suffer substantial prejudice from allowing Registrant to oppose cancellation. See id. A few months' delay in adjudicating the Petitioner's claims is the only conceivable basis for any claim of prejudice in this case, and the Board has stated that "delay alone is not a sufficient basis for establishing prejudice." Regatta Sport Ltd. v. Telux-Pioneer Inc., 20 U.S.P.Q.2d 1154, 1156 (T.T.A.B. 1991). Furthermore, any delay in this case will be modest, since the Answer was due only three months ago.

Finally, Registrant has a meritorious defense to the Petitioner's claims. See Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc., 21 U.S.P.Q.2d 1556, 1557 (T.T.A.B. 1991). Petitioner's basis for challenging registration is apparently based on a likelihood of confusion between the Petitioner's mark, COMPUTER MOMS, and Registrant's mark; the Petition states "[c]onfusion exists from the very similar name - computers dot mom." Leaving aside significant differences between the words of the marks -- COMPUTER MOMS and COMPUTERSDOTMOM -- the Petitioner's allegation fails to take into account that Registrant owns U.S. Registration No.

2,412,405 for the mark COMPUTERSDOTMOM COMPUTER SKILLS, CONFIDENCE AND REALLY GOOD COFFEE and Design ("Registrant's Mark"), not just COMPUTERSDOTMOM. Any superficial similarity between the marks arising from simultaneous use of the words "computer" or "computers" and "mom" or "moms" is clearly dispelled when the marks are considered in their entireties, as required. See, e.g., Massey Junior College, Inc. v. Fashion Institute of Technology, 492 F.2d 1399, 1402 (C.C.P.A. 1974). Registrant's Mark comprises not only the words allegedly giving rise to confusing similarity -- "computers" and "mom" -- but also a design of a woman holding a computer and the slogan "computer skills, confidence and really good coffee." Furthermore, Registrant's Mark is also distinguished from COMPUTER MOMS by a fanciful play on the words that generally comprise the address of a site on the Internet. Registrant's Mark uses "mom" in the place of an accepted top level-domain indicator such ".com" or ".org" or ".net" and spells out "dot" rather than merely using a period. All these elements serve to distinguish Registrant's Mark from that of the Petitioner and to render confusion unlikely in the extreme.

In conclusion, setting aside the Notice of Default at issue here would serve the Board's often-

expressed policy that favors deciding cases on their merits. See, e.g., Thrifty Corp. v. Bomax Enterprises, 228 U.S.P.Q. 62, 63 (T.T.A.B. 1985). Application of this policy is especially appropriate here where the failure to answer the Petition arises from no misconduct by Registrant or Registrant's counsel, and Registrant had no intention to default and wishes to answer the Petition and defend this action. See Identicon Corp. v. Williams, 195 U.S.P.Q. 447, 449 (Comm'r 1977).

Accordingly, as Registrant had no notice of this cancellation proceeding until receiving the Notice of Default, and as Registrant has shown that good cause exists for the Board to act pursuant to Rule 55(c) of the Federal Rules of Civil Procedure, Registrant respectfully requests that the Board quash the default and allow Registrant to answer the Petition. Registrant additionally requests that the Board establish a new schedule for the filing of Registrant's Answer and for the discovery and testimony periods in this proceeding.

Dated: Washington, D.C.
November 27, 2002

Respectfully submitted,

Rita M. Carrier

Rita M. Carrier, Esq.
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Attorneys for Registrant,
Alison Holtzcshue

Certificate of Service

I hereby certify that a true copy of the
foregoing Motion To Set Aside Default was mailed to
Petitioner Georgia Graham Jones, 42 Pascal Lane, Austin,
Texas 78746, via certified mail, return receipt requested,
postage prepaid, this 27th day of November, 2002.

Dated: November 27, 2002

Rita M. Carrier

Rita M. Carrier

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NEW YORK * LOS ANGELES * PALO ALTO

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MELBOURNE

November 27, 2002

By Hand

Commissioner for Trademarks,
United States Patent and Trademark Office,
2900 Crystal Drive,
Ninth Floor, Room 9B10,
Arlington, Virginia 22202-3513.

Attention: Trademark Trial and Appeal Board

Re: Georgia Graham Jones v. Alison Holtzschue,
Cancellation No. 92040746

Dear Commissioner:

On behalf of Alison Holtzschue, I enclose her Motion To Set Aside Default in the above-referenced cancellation proceeding. A copy of the enclosed Motion is being served today on the Petitioner.

Please date-stamp the enclosed additional copy of the Motion and return it to the messenger.

Please telephone me at (202) 956-7685 with any questions regarding this matter.

Very truly yours,

Rita M. Carrier
Rita M. Carrier

(Enclosure)

FAX COVER PAGE

SULLIVAN & CROMWELL

1701 Pennsylvania Avenue, N.W.
 Washington, D.C. 20006-5805
 Telephone: (202) 956-7500
 Facsimile: (202) 293-6330



FAX NUMBER



VOICE NUMBER

Date: March 19, 2003

FROM:

SENDER'S NUMBER(S)

Rita M. Carrier



(202) 956-7685 (voice)

TO:

COMPANY

NUMBER(S)

1. Ms. Shirley Hassan

Trademark Trial and Appeal Board



(703) 746-7118



(703) 308-9300


Message:

Dear Ms. Hassan,

As we just discussed, I am sending to you a copy of the Motion to Set Aside Default that we filed on behalf of Alison Holtzschue on November 27, 2002. The attached copy was stamped by the Patent and Trademark Office to evidence its receipt of the document.

I look forward to hearing from you about this matter.

Sincerely,


 Rita M. Carrier

 Number of pages
 sent

If there are any problems with this facsimile, please call Maria B. Shelton at this number: (202) 956-7558

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